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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 335.

ROY H. ROBINSON, ADMINISTRATOR OF THE ESTATE OF JOHN C. ROBINSON, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

BRIEF OF APPELLANT.

CHAS. H. MERILLAT,
CHAS. J. KAPPLER,
Attorneys for Appellant.

J. D. MILANS & SONS, 707 EIGHTH STREET, N. W., WASHINGTON, D. C.

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This is an appeal by appellant from a judgment of the Court of Claims in his favor for $33,964.10 (Trans. rec., p. 23). The appeal, aside from some alleged minor errors of the Court below, is based, first, on the ground the Court of Claims erred in law in undertaking to apportion liquidated damages for delay in completing a contract wherein it has found the delay was due to mutual faults of both contractor and the United States, the Court splitting this item fifty-fifty between appellant and appellee; second, on the ground of error in holding the United States had a right after acceptance of

the contract to expend $10,401.45 (rec., p. 22) retained from the final payment in repairing principally certain window sash and a small number of appurtenant window frames, which sash the contractor had built of solid oak after protesting unsuccessfully against the specification as unsuitable and bound to warp, and which sash thereafter did warp and prove unsuitable as predicted and in warping affected certain of the window frames—number not proved by appellee and not found by the Court (p. 22).

Statement of the Case.

The United States, pursuant to an act of Congress approved March 2, 1899 (rec., p. 13), undertook the construction of what is now known as the New York City Custom House building. It first let a separate contract for the excavation and foundation work (p. 13) and then followed separate contracts for walls and structural steel work and for the mechanical equipment. These were followed by the letting of a contract by then Secretary of the Treasury Shaw (p. 45-7) to appellant, the lowest bidder, on August 30, 1905, for the interior finish at $1,037,281.69 (p. 14) after the architect and supervising architect had unsuccessfully endeavored to have the contract awarded to one Pierce, the contractor for the walls and structural steel work, whose contract was still uncompleted (p. 13), and it may be said in passing was very many months behind time, though this is immaterial here except in its incidental bearing on Finding XXIII in the instant case (p. 23).

The contract fixed the date for appellant to com-

plete his contract at October 15, 1906 (p. 14) and by stipulation (p. 28) it, with proposals, etc., has been printed only as to parts deemed material, the Court of Claims, by reference, making all these papers part of its findings of fact (p. 14).

On the subject of liquidated damages the proposal notified bidders that (p. 31) "time for the completion of the work shall be considered as of the essence of the contract" and that in place of extra rents, salaries and all other expenses entailed on the government by delay "the United States shall be entitled to the fixed sum of $420 as liquidated damages, computed, estimated, and agreed upon, for each and every day's delay not caused by the United States. Provided, however, that the collection of said sum may, in the discretion of the Secretary, be waived in whole or in part; and that the contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government.

"The Department, acting for the United States, reserves the right to suspend any portion of the work embraced in the contract, whenever, in its opinion, it would be inexpedient to carry on said work."

The contract as let read:

> "It is expressly covenanted and agreed by and between the parties hereto that time is and shall be considered as of the essence of the contract on the part of the party of the second part, and in the event that the said party of the second part shall fail in the due performance of the entire work to be per-

formed under this contract, by and at the time herein mentioned or referred to, the said party of the second part shall pay unto the party of the first part, as and for liquidated damages, and not as a penalty, the sum of four hundred twenty dollars, for each and every day the said party of the second part shall be in default, which said sum of $420 per day in view of the difficulty of estimating such damages with exactness, is hereby expressly fixed, estimated, computed, determined and agreed upon as the damages which will be suffered by the party of the first part by reason of such default, and it is understood and agreed by the parties to this contract that the liquidated damages hereinbefore mentioned are in lieu of the actual damages arising from such breach of this contract; which said sum the said party of the first part shall have the right to deduct from any moneys in its hands otherwise due, or to become due, to the said party of the second part, or to sue for and recover compensation or damages for the nonperformance of this contract at the time or times herein stipulated or provided for." * * *

With another provision, as follows:

"It is further covenanted and agreed that the said party of the first part shall have the right of suspending the whole or any part of the work herein contracted to be done, whenever, in the opinion of the Architect of the building, or of the Supervising Architect, it may be necessary for the purposes or advantages of the work, and upon such occasion or occasions the said party of the second part

shall, without expense to the United States, properly cover over, secure, and protect such of the work as may be liable to sustain injury from the weather, or otherwise; provided that for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect; provided, that no claim shall be made or allowed to the said party of the second part for any damages which may arise out of any delay caused by the said party of the first part, the United States."

There was no provision for liquidated damages, as in some building contracts, upon separate branches of the contractor's job, as marble, ornamental iron work, tiling, etc.

But, there was a general provision for loss of the contract and of actual, not liquidated, damages as follows (p. 52):

"It is further covenanted and agreed that the party of the first part shall have the right to require that any particular portion of the work here provided for shall be completed within such time as may be hereafter definitely specified by the said party of the first part in written notice to the said party of the second part; and that should the said party of the second part fail to complete such particular portion of the work within the time so specified, or fail to complete the entire work contemplated by this contract within the time or times herein stipulated or provided for;

or fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided, the said party of the first part may withhold all payments for work in place until final completion and acceptance of the same, and is authorized and empowered, after eight days' due notice thereof in writing, served personally upon or left at the shop, office, or usual place of abode, or with the agent, of the said party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the said party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete, or have completed, the said work, and to supply or have supplied the labor, materials, and tools, of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part shall be further liable for any damage incurred through such default and any and all other breaches of this contract."

There was no action taken under the foregoing paragraph of the contract and hence no finding in regard to it by the Court of Claims.

There were a number of delays in the work by the Treasury Department due to suspension orders and

other causes prior to October 22, 1906. At the time of the letting of the original contract to appellant the Treasury Department desired to incorporate into the finish of the building certain work that would cause the total cost to exceed the available appropriation and the bids exceeding the appropriation in the original contract, it cut out certain items to bring the total cost within the appropriations. Later increased appropriations were obtained and on October 22, 1906 the Treasury Department directed appellant to do certain additional work beyond his contract for the lump sum of $200,044.01 (p. 54).

This letter directing appellant to restore the work, on the subject of time, provided:

> "It is understood and agreed that it is a condition of this action that the time for completion of all the work included in your contract, and that hereby ordered, is June 1, 1907, and that such extension is in lieu of all additional time which accrues to you on account of delays by the Government; and that you shall, within eight (8) days from this date, namely, October 31, 1906, deposit with this Department the formal consent of the sureties on your bond to this change; also that, within the said eight days you deliver to this Department a schedule indicating the points of advancement you will reach on the first day of each month up to and including June 1, 1907, so arranged as to insure the completion of the building on or before that date. Should you elect not to file such schedule by October 31, 1906, the Department will definitely direct the amounts of work to be performed in each respective month, in such

sequence as appears most advantageous; and you are further advised if at any time it appears the work required for any month is not satisfactorily completed, such fact will be taken as conclusive evidence that you are in default under your contract, and the Department, in view of such default, acting under the rights reserved by such contract, will proceed to finish the building at your expense and the expense of your bondsmen.

"Any previous directions to you, relative to the stoppage or deferring of work affected by this order, are hereby canceled and revoked."

The department never exercised this reserved right and hence there is no finding on the point.

Appellant's original contract had included approximately $500,000 worth of marble work (p. 42) and this supplemental contract increased this amount of marble work.

Appellant and his sureties signed the formal consent the government required (p. 56-8).

The Government's letter of restoration made the extension of completion of appellant's contract to June 1, 1907, due to the supplemental work, serve as a waiver of the additional time due appellant up to that date for delays which had accrued on account of defaults of the Government.

Subsequent, however, to the date of this supplemental contract evidenced by letters of October 22 and 31, 1906 (Finding III, p. 14) the Government suspended various parts of the work to be performed by appellant and completed by June 1, 1907, under the supplemental agreement.

The findings of fact of the Court of Claims on this point state (Finding XXIII, p. 25):

> The completion of the contract was delayed 121 days beyond June 1, 1907, the termination of the contract period as extended by the order and supplemental agreement set out in Finding III. Of this delay 12 days were held by defendant to be chargeable to the Government on account of delays in approving and returning the contractor's drawings. The remaining 109 days were held chargeable to the contractor, and liquidated damage therefor at the contract rate of $420 per day, amounting to $45,780, was, against the contractor's protest, charged and retained against him in the department's proffered final settlement on the contract, which sum the defendant still retains.
>
> Of the total delay in the completion of the contract but 61 days' delay was due to the fault of the contractor, the remainder of such delay being due to suspensions and other delays in the work caused by the defendant subsequent to October 22, 1906. The amount of the liquidated damages charged and retained against the contractor by the defendant on account of delay for which the contractor was not responsible, and was therefore not chargeable, was $20,160.

The Court of Claims had been requested by appellant to make the foregoing findings of fact more definite and certain, and the request was renewed and a substitute for the finding substituted to show that some of the suspension orders in question ran

beyond June 1, 1907, the date named for completion of the contract, and that some suspension orders in fact still existed in August, 1907, but the Court would not do so.

The nature of some of these suspensions, however, and that they in point of fact considerably exceeded 61 days or half of the 121 days in question can be gathered from the Court's opinion in the case. Thus, the opinion states (p. 24) that the Treasury Department admitted it should allow appellant twelve days in completion of the building (the drawing delays in fact many of them exceeding sixty days) "because of delay by the Government in furnishing certain drawings."

The Court found (p. 25) that there were other delays on the part of the Government and suspensions of performance of work which did by suspension of these parts delay completion of the whole work. The matter is thus expressed in the opinion:

> "We are not concerned with suspensions prior to the supplemental contract of October, 1906, because that contract extended the time of performance and took account of delays to that time, but if a suspension made prior to the October contract on part of the work was not lifted until after that date, and if such continued suspension of part so affected the whole of the work as to delay its completion within the contract time, then that suspension becomes material. And an instance of that kind happened. In August, 1906, an order directed the suspension of certain work, including marble work on the Bridge Street stairway No. 116, and the order to resume

work was not issued until the end of March following—more than six months. The architect himself states that the contractor was delayed by these items and would doubtless claim exemption upon them, but also concluded that the primary cause of the delay was the contractor's refusal to submit a reasonable bid for certain work. We take a different view of this matter and hold that inasmuch as the department could have fixed the price it need not have waited upon the contractor's bid, and in fact did not so wait, and that the suspension made in August and continued until nearly April did operate to delay completion of the work, which according to the supplemental contract was due to be completed by June 1. As early as December, and several times thereafter, the contractor had called on the department to be allowed to proceed with incidents connected with this particular work. We have not found that a period equal to the entire time of the suspension should be added to the time the contractor had within which to complete, but that a portion of it should be so added. Similarly, on account of other suspensions the contractor should have additional time. The extension of one day for each day's delay in the performance of the entire work caused by suspensions at divers times of parts of the work has been found in finding XXIII."

The Bridge Street stairs was a main stairway with much marblework.

The Court also found as a fact that the Department had proffered appellant a final settlement based on remission of the penalties for only twelve days (Finding XXIV, p. 23) and that the contractor

ing, has authority for the preparation of drawings and specifications therefor, and for the supervision of its construction; and is invested with the customary authority of an architect, except as limited by the regulations of the Department.

"The said Cass Gilbert, either personally, or by duly authorized representative, shall have the power and authority to inspect, examine, and approve or reject materials, methods and workmanship furnished or used under this contract, and to direct the conduct, management and progress of the work and any or all parts of the same."

"Inspection:

"Each bidder must understand that, should his proposal be accepted, the materials delivered and the work performed by him at any and all times during the progress of the work, shall be subject to the inspection of the Architect or his authorized representative, with the right to accept or reject any part thereof, that, in the opinion of the said Architect or his authorized representative, is not in accordance with the drawings and specifications; and that he must, at his own expense, within a reasonable time to be specified by the Architect, remedy any defective or unsatisfactory material or work, and in the event of his failure to do so, after eight days' notice, the Department shall have the right to have the same done and to charge the cost thereof to the Contractor's account." * * *

"Final Acceptance (p. 34):

"It is required that all work included under

this contract must be delivered in good condition at the time of completion and delivery of the building to the Government, and no reason or excuse for failure to so deliver it, *other than the acts or orders of the Department or its representatives,* will be valid. Previous acceptance, alleged approval or failure to object to conditions or methods shall not constitute a justification for defects, if any, which may appear at delivery." (Italics ours.)

"Guarantee:

"The Contractor is required to guarantee and maintain the stability and satisfactory condition of all material and work furnished under this contract, and keep the same in perfect condition for one year after the issuance of the final certificate, except as otherwise specified, stipulated or specifically set forth in the contract.

"Attention is called to other special guarantees for a longer period as hereafter required.

"Original defects, or defects, breakage or deterioration resulting from reasonable and customary use or wear of materials furnished, when used for the purpose intended in a usual and proper manner, which may appear within one year, must be made good by the Contractor, at his own expense, whenever called upon to do so by the Secretary of the Treasury. Such repairs are to be executed under the direction of the Architect, and to his satisfaction, it being required that all work is to be in perfect condition when such period of one year shall have elapsed, with the following exceptions:"

And the following special conditions or specifications (p. 38):

> "Sash for Outside Windows: * * *
> "Exterior sash in basement and sub-basement windows to be white pine. All other sash to be of oak, glazed generally with plate glass, as elsewhere specified, with exceptions noted. See 'Glazing.'
> "Straight grained wood to be used in al sash."

> "Interior Frames and Sash:
> "Interior window frames, are to be constructed generally as per typical details. Any portion not definitely covered to be of section and construction similar to others of same general kind. Wood of interior window frames to be *solid oak*, except as specified otherwise." (Italics ours.)

Appellant objected before erection to the specification calling for solid oak sash and specially directed the attention of the Government to the fact that such solid oak sash in window frames would be sure to warp and twist, due to warm inside air and cold outside air, especially in the damp atmosphere of lower New York City adjacent to the water front and made suggestions to the Architect to meet the conditions. His protests were overruled and he was directed to follow orders, and under protest did so. Events after the Government took the building over justified the appellant's protests. Nevertheless, the Government at the instance of the Architect and Supervising Architect retained $12,000 admittedly due

the Contractor, above liquidated damage and other retentions, and after appellant had left the job spent $10,401.45 of the money without consulting the Contractor in making good the effects of its improper specifications (p. 22).

The Architect was to receive under his contract with the Government 5 per cent for his services (p. 13). The Supervising Architect allowed the Architect 10 per cent or $1,072.26 for supervising the work of remedying his own faulty specifications and remedying two minor alleged defects costing $321.20 and exhausted the balance of the $12,000 by charging up $205.09 or the difference to compensation for alleged deficient character of certain mirror frames. (Nos. 4 and 5—Finding XXII, p. 22). The Court of Claims disallowed Nos. 4 and 5 (Conclusion of Law —Finding XXII, p. 23) and held that under the Guarantee Clause of the Proposals the Government had the right, regardless the error was its own, to charge against appellant the $10,401.45 expended to make good the Architect's faulty specification complied with by appellant under protest.

The matter is thus set forth in the Findings of Fact (Findings XXI and XXII, p. 22):

XXI.

> The contract called for most of the window sash of the building to be of solid oak, which wood is not especially suited for a damp climate and locality, such as lower New York City, on account of its liability to warp under damp and changing conditions of moisture and temperature.

The contractor, before putting in the windows, called the architect's attention to this fact and suggested a modification of the form of construction of the sash for the purpose of obviating as much as possible the danger of their warping, which suggestion was not accepted by the architect or department. Owing to the fact above stated, and to the further facts that the materials of some of the sash were not of the best quality, nor thoroughly seasoned, and that the workmanship in their construction and installation was in some instances not of first-class character, there occurred, before the completion of the building and within one year after the issuance of the department's certificate for final settlement, much warping, shrinking, and misfitting in a very large part of these sash, which required extensive repairs of an expensive character. The department demanded of the contractor that he make these repairs, which he refused to do except as extra work for which he should receive extra compensation. To this the department would not agree. Subsequently the contractor repaired a small part of these windows, about 12 in number, but under written protest and notice to the department that it was extra work for which he expected extra compensation. Later he presented a claim of $1,043.69 for this work, which was disallowed by the department.

XXII.

In a report of February 7, 1908, to the Supervising Architect, the architect of the building recommended that the department retain

from the contract price for the work the sum of $12,000 for the repair of said window sash and of window frames, and the completion and repair of certain other items of work on the building which the contractor had failed to do, any balance remaining over from the work to be paid to the contractor; and upon this report and recommendation the Supervising Architect, in his report and recommendation of March 13, 1908, to the Secretary of the Treasury for final settlement with the contractor, recommended the retention of said sum for the purpose stated. In accordance with these recommendations said sum was, against the contractor's protest, so retained by the department, and against this retained sum there were subsequently charged by the department expenditures, etc., as follows:

1. For repairing said window sash, and also some of the said window frames, and for repair and completion of some other work which the contractor had failed to perform, $10,401.45, the greater part of which sum was for sash repairs.

The court's opinion on this point is set forth at page 26 and holds in substance that where a contractor guarantees the stability for one year of his material and work (p. 34) the guarantee holds good against material and work he was forced to put in by express orders after protest the same as where the fault was his own. The court did not find and there was no evidence, so the appellant could not meet same, which or how many sash or frames were

the Court cannot apportion; the thing to be done is indivisible not divisible in the absence of a division provision in the contract, unless a new date is fixed before completion by agreement or lawful orders, the matter is at large and actual damage must be shown; what the contractor would have done had the owner been free of fault and the contractor unhampered, is pure speculation.

In the instant case the contractor was under suspension orders when June first arrived.

In United States vs. United Engineering Co., 234, U. S., 241, the Court said:

> "The precise question here is whether, when the work was delayed solely because of the Government's fault beyond the time fixed for its completion and afterwards the work was completed without any definite time being fixed in which it was to be done, the claimant can be charged for the subsequent delays for which he was at fault by the rule of the original contract stipulating liquidated damages, or was that stipulation waived by the conduct of the Government and was it obligatory upon it in order to recover for the subsequent delays to show the actual damages sustained? We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party *must not prevent the performance of the contract within the stipulated time*, and that where such is the case, and thereafter the work is complet-

ed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date, to do this would permit to recover damages for delay caused by its own conduct.

"It may be that damages were sustained by the failure to carry out the subsequent agreement. But the Government, as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the Government required no stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered.

"This conclusion is in accord with the rule of the English cases. In Dodd vs. Churton, L. R., I. Q. B. 1897, 562, 568, Chitty, L. J., said:

> 'The law on the subject is well settled. The case of Holme vs. Guppy (3 M. & W., 387), and the subsequent cases in which that decision has been followed are merely examples of the well known principle stated

in Comyns' Digest, Condition L (6), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it. The law on the subject was very neatly put by Byles, J., in Russell vs. Bandeira (13 C. B. (N. S.), 149). This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time.'

"The same rule was followed with approval by the New York Court of Appeals in a well considered case, Mosler Safe Co. vs. Maiden Lane S. D. Co., 199 N. Y., 479, in which it was held that, even where both parties are responsible for the delays beyond the fixed time, the obligation for liquidated damages is annulled, and in the absence of a provision substituting another date it cannot be revived, and the recovery for subsequent delays must be for actual loss proved to have been sustained."

Mosler Safe Co. vs. Maiden Lane S. D. Co., *supra*, is instructive and decisive.

In that case the defendant made the point as to whether liquidated damages, conceding there had been mutual delay, should not be allowed from a date fixed by the architect beyond the contract date as being the period of time in excess of the contract period when the work should have been finished by

plaintiff notwithstanding defendant's delay—the architect apportioning the time these mutual delays caused in completion of the contract. The defendant contended that the architect having so fixed the time his acts could not be questioned "unless o arbitrary and capricious as to indicate fraud or bad faith."

The Court said:

> "While the contract did constitute the architect named therein the final arbiter in disputes 'regarding the construction of the specifications' and 'as to whether materials used and work done were according to their true intent and meaning, he was, in other respects, the *agent of the appellant*. It was provided that the work was to be done to his satisfaction and under his direction, and in determining upon the plans and drawings, or upon changes therein, or in the work, he was the representative of the appellant. (Note: In the instant case the Treasury Department itself gave and lifted the suspension orders.) It was not necessary, if the jury believed that through any acts of his, or through his omission to act within a reasonable time, substantial delays in the completion of the work were caused, that his conduct should indicate fraud or bad faith. The question was, whether the appellant, through its architect, or otherwise, was responsible for materially delaying the respondent in the completion of the work within the time specified. The question of the architect's good or bad faith was not material.
>
> "It having been conclusively determined that the defendant was responsible for a substantial part of the delay in the completion of

the work, the principal question arises upon the instruction of the trial Court that thereby the right to counterclaim for the liquidated damages was abrogated.

* * * * * *

"Such an obligation could not be renewed except by some express agreement. Its nature forbids inferring its renewal. An apportionment of the fault is impossible under such a contract, Weeks vs. Little, 89 N. Y., 566. The rule that there can be no apportionment of the damages for delays caused by mutual default has, also, been asserted in the Federal Courts, Caldwell & Drake vs. Schmulbach, 175 Fed., 429." * * * (Note: In which the contract itself provided for apportionment, page 434.)

"The appellant founds an argument upon the provision of the specifications that, if the defendant should require any alteration or deviations, the same could be made without annulling or invalidating the contract, and that in such event an allowance shall be made for the same on one side or the other as the case may be by the architect. This does not affect the question differently. The provision operated to prevent the plaintiff from claiming that the contract was invalidated. It could not renew the obligation to pay liquidated damages, which had been put an end to by delays, for which the appellant was, in part, responsible.

* * * * * *

"Where the parties are mutually responsible for the delays, because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled, and, in the absence of some provision

under which another date can be substituted, it cannot be revived. If the respondent failed to complete within a reasonable time after crediting the appellant's delays, then the latter had a cause of action for the former's neglect and the measure of damages would be the actual loss proved to have been sustained."

Willis vs. Webster, 1 App. Div., N. Y., 301:

> "Where liquidated damages are to be sustained after a given day, the plaintiff contractor is entitled *to know with precision* when he is laboring under an obligation for liquidated damages, and not be required to leave it to the judgment of a jury as to what is a reasonable time. It is impossible under the contract to apportion liquidated damages. Either the liability for the liquidated damage exists, or it does not. It cannot half exist and half be waived. In the case at bar there was a definite contract, which was abrogated by the acts of both parties, and it requires equally concerted action to breathe life into it again." (Italics ours.)

If not to be left to a jury's judgment, why to the courts? Is it more capable in a building matter on a question of fact than a mixed jury?

Jefferson Hotel Co. vs. Brumbaugh, 168 Fed., 867-74:

> "Where the owner let a large amount of work to independent contractors and their delay caused part of the general contractor's delay, the owner is chargeable with the independent contractor's delay, and the general contractor is relieved as the Court will not attempt to apportion the delay.

"It is vigorously urged that the contractor was responsible for a number of days of delay and the defendant company for only a few of the days thereof, and that the Court, under such circumstances, should attempt to apportion such delay between the two and hold the contractor liable in penalty for those days that it, in its judgment, deems he may be chargeable with. This is just what the courts cannot, with any degree of certainty, do, and therefore refuse to do. It needs but a moment's practical consideration of common building operations to realize that a contractor may not complete the woodwork until the plastering is done; he may not in many instances complete the cement work until the plumbing is placed; he may not do the painting until the marble work is done. To perform his work he is entitled to work upon an orderly and systematic plan. It could not be required of him to move his scaffolding, his tools and implements, and his workmen back and forth from one quarter to another just as the other contractors might complete in one quarter a part of the heating, in another part the plumbing, and in another the tile and marble work, in order that he should be free from the charge of delay. Courts cannot know of these conditions as they actually existed at the time, and the evidence would be very unsatisfactory, taken months after, that would attempt to set forth all such conditions. Therefore the courts have laid down a very salutary rule to the effect that they will not attempt to apportion such delays where the causes thereof have been mutual, but will refuse under such circumstances to enforce the penalty. The law on this matter

is well laid down in a series of New York cases."

Village of Argyle vs. Plunkett, 175 N. Y. Supp., 751, action for liquidated damages, held:

> "The referee found as a fact that the village delayed the contractor 21 days in completing the work. The evidence supports this finding. This delay was a substantial hindrance to the progress of the work.
>
> "Where one party to a contract is himself partly responsible for the delay in the completion of the work, the clause in the contract providing for liquidated damages *is abrogated, an apportionment of liquidated damages under such circumstances will not be tolerated.* * * * Whenever a party attempts to enforce a claim for liquidated damages he should be quite certain that he is himself without fault. * * * Liquidated damages savor of a penalty. The levying of such damages upon the party in default is a drastic enforcement of the contract. The party insisting upon this literal, strict and severe enforcement of the terms of a contract must be wholly free from fault."

Mitchell vs. Davis, 73 W. Va., 403-05:

> "Liquidated damages, being an entirety, cannot be apportioned between the parties when both parties are in default. *There is no way of ascertaining to what extent the default of one affected the default of the other.* (Italics ours.) When both parties are to blame for non-compliance with the terms of

a contract there can be no apportionment of the liquidated damages therein stipulated for.

Delay of performance by a party otherwise entitled to liquidated damages operates as a waiver, Dannat vs. Fuller, 120 N. Y., 554.

Or, as expressed in Champlain Const. Co. vs. O'Brien, 117 Fed., 271-77:

> "Plans and materials to be furnished by the company were not provided till after the contractors were entitled to them, and these hindrances contributed substantially to the delay for which the deductions were made. If they should be left to stand, the company would recover damages of the contractors for its own neglects. There is no way for summing up the defaults of each and apportioning the damages to them, but the whole must be allowed or none, and as all cannot be, none must be. These deductions must therefore be restored."

In the foregoing case as in the instant case the contract contained provisions for work to be performed per schedule with right in the chief engineer to decide questions of delay arising and for the work to be taken over by the owner if speed of construction were not satisfactory.

Holme vs. Guppy, 3 Messon & Welsby's Reps. 386.

This was a building contract containing a provision for liquidated damages for each day's delay in completion beyond a named date. Completion was delayed for five weeks and after much testimony

Counsel agreed four weeks of the time was due to defaults of the owner and one week to delay due to defaults of the builder's workmen, and the case was resumed on the law point involved.

The court, by Baron Parke, held: "We think no deduction ought to be allowed to the defendants. It is clear, from the terms of the agreement, that the plaintiffs undertake that they will complete the work in a *given* (italics the courts) four months and a half; and the particular time is extremely material, because they probably would not have entered into the contract unless they had had those four months and a half, within which they could work a greater number of hours a day. Then it appears that they were disabled by the act of the defendant from the performance of *that* (italics the courts) contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default."

The wisdom of the English rule that because a contractor is willing to stipulate he will do certain work within a fixed period it does not follow if delayed he will perform within the fixed period plus the period the owner delays or suspends performance and pay liquidated damages ascertained after final completion is obvious where the work is building construction and especially largely marble—an industry with comparatively few and closely unionized mechanics. Appellant might have been able to get a large number of them in the dull months. Does it follow he could in the rush summer season when all New York city construction is anticipatory of

"moving day," October first. And if it came a question of balancing overtime wages against liquidated damages, is not a contractor entitled to know when the latter is to start?

Weeks vs. Little, 89 N. Y., 566-70.

This was a case involving whether plaintiff contractors for marble work, elevators and steam heating apparatus were liable for liquidated damages in not complying with a time limit in a building contract. The referee found as a fact that the plaintiffs as to certain parts of their contract work were "delayed and prevented from completing" within the contract period by defendant's failure to furnish and put in place certain work on which this part of plaintiff's work was to be imposed and also (p. 569) that "plaintiffs did not complete some part of their work which was not dependent upon the defendant's action until December 24"—the contract date being October 1 (p. 568). The referee and lower court held liquidated damages applied.

The Court of Appeals held the rule "is well settled that where the work to be performed by the builder cannot be performed until the other work provided to be done by the owner or his employes is finished, the failure by the latter *to complete their work in season* to enable the builder to end his within the time limited by the contract is a sufficient excuse for his delay beyond the agreed period of completion," * * *

"It is true he (the referee) finds that some work was delayed which was not affected by the delay of the defendant. We do not see how that fact alters the just result. To effect that would require us to

assume what is not proved, and we cannot know, that there would have been delay in the independent work if the dependent work had not been hindered. The contractor could gain nothing by haste and pressure in one direction so long as entire completion was delayed by his employers. *We cannot divide and apportion the fault. It is enough that damages were payable upon a failure of entire completion,* and that was rendered impossible by the defendant's act, and her executor cannot recover for a failure which she made inevitable. But for that we cannot say that there would have been any delay beyond the contract time . (Italics ours.)

Carnegie Steel Co. vs. U. S. 49 Ct. Claims 407.

> "The parties could have stipulated for liquidated damages based upon the contract prices for the separate instalments and to run from the respective dates fixed for the delivery of the separate instalments; but they stipulated otherwise when they provided that the damages should be computed from the date fixed for final delivery of all the armor. Without interpolating a clause which the parties did not use we cannot construe these provisions of the contract as being affected by the dates for delivery of separate instalments of the work."

The Court of Claims attempts in its opinion to get around these authorities and to hold they do not apply with the assertion that it, in its conclusion awarding the amount in dispute as to 60 days at $420 per day to the contractor and 61 days to the United States, is not "apportioning" the delay due to mutual defaults, that United Engineering Co. vs. the United States, *supra*, is not applicable, and that it

is, in stead of "apportioning" the time between owner and contractor, "computing" the same under a contract provision not naming a date but enabling one to be definitely fixed—by computing or apportioning the fault between the parties. To Counsel it seems like an advocates special pleading of a hard case, swaying the law not interpreting it.

United Engineering and other cases lay down a rule of policy, that the party who wants the pound of flesh, the literal interpretation and the rigid fulfilment of the contract, must not be blameworthy, must not leave to uncertainty and settlement day the time when the muleting for delay in liquidated instead of actual damage is to start and must have the contractor know while he is performing and not afterwards that he is under the penalty.

Liquidated damage contracts while enforced are not viewed with distinguished favor. Since the judicial decisions upholding them there has been some tendency to carry them too far and as said in Northwestern Terra Cotta Co. vs. Caldwell 234 Fed. 491, "several states have prohibited liquidated damage claims except under statutory limitations or with statutory modifications."

It would have been competent perhaps for the Government to have inserted a clause that in the event of suspension of any part of the work the contractor could obtain an extension of time by applying for it within a fixed period and should not be entitled to such extension or be relieved from the time obligations of the contract unless he did so apply within the time limit, Jones vs. St. John's College, 6 Q. B. 115. But it is sufficient to say that the

contract contained no such provision. Even in such cases the courts do allow the delays due to the owner though not claimed at the time, Curry vs. Olmstead, 26 R. I., 462.

The Court of Claims in its opinion recognizes the injustice and unfairness of permitting the owner when it comes to accounting to the contractor and the owner has caused the delay to determine in his own favor how much delay he will admit he has caused the contractor. It holds that the Government did delay appellant far longer than it was willing to admit, 60 days instead of 12, and gave judgment for the difference. But it then says it, the court, can go to the contract and it, the court, fix a new date. Its finding and opinion is one that the Treasury Department erred in law and in fact and was guilty of a gross mistake in its settlement and that the Treasury Department, through its architect and supervising architect, and lawful suspension orders compelled one-half the overtime in appellant's completion of his contract. Where does the Court of Claims get power from the contract to so distribute the delay in the form of a judgment? What is it doing but "apportioning" delays? Where is the contract provision authorizing and empowering the Court to ascertain the "definite period from which the liquidated damages are to be computed?" The foregoing authorities express that courts cannot do so under their general powers as judicial tribunals, but err if they attempt to pass on mutual delays in such contracts except to hold the liquidated damage clause annulled. The Court in its opinion states that the Secretary of the Treasury did not

follow the supervising architect in that regard and also that the Treasury's 12-day drawing-delays allowance was not conclusive and further was not fair or reasonable in view of the suspension orders. The, courts, vide United Engineering Company case, cannot lawfully do so whatever their lawful power to enforce specific contracts of the parties.

It is not necessary to be here passed on, but if it were counsel would contend the language of the contract correctly construed gave the supervising architect no power or authority after completion of the work to ascertain delays due to suspension orders. He was the legal representative of one party to the contract, and not even an unbiased representative for he had tried to prevent appellant as the lowest bidder getting the contract and with the architect was overruled by the Secretary. Appellant's troubles began that day. The Supervising Architect did not undertake when he gave or lifted suspension orders to fix at the time a new date from and after which liquidated damages should run. In fact had he so fixed he, as to certain of the suspension liftings, would have had to name a date subsequent to either the contract date of June 1, 1907, or the court date of 60 days afterwards, for the written liftings as to some suspension items essential to use of the building, notably collectors, naval officers and surveyors' suites, Ceramic floors in the basement and toilet accessories if this court chooses under its power to make call on the Court of Claims for more definite findings, were in August and September, 1917.

The language of the proposal is (p. 31) "that the

contractor is to be entitled to one day, in addition to said stipulated time, for each day's delay that may be caused by the Government." To the average contractor this would mean that as to any suspension in a substantial matter "one day's suspension one day's delay," certainly if the suspension order or lifting named no other time. The contract reads (p. 523): "for all such suspensions and other delays caused by the said party of the first part the party of the second part shall be allowed one day additional to the time herein stated, for each and every day of such delay so caused, in the completion of the contract, the same to be ascertained by the Supervising Architect." This, it would seem, would not be read by the average contractor differently from the proposal form except that delays other than suspensions would be ascertained by the Supervising Architect, as involving matters not perhaps mathematically calculable as in suspension orders, but that these extra days would be announced to him at the time so he would know his dates and govern his construction operations accordingly. Such a construction might conform interpretation to legal authorities; a contrary construction would not. Between two interpretations, one favorable to and the other against the law the former prevails. So between reasonable and unreasonable results from interpretation. Likewise interpretation construction where two may prevail is mostly against the draftsman of the contract.

Pressed Steel Car Co. vs. Eastern Ry. Co., 121 Fed., 609-11.

Where the language of an agreement is contra-

dictory, obscure or ambiguous, or where its meaning is doubtful so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair or improbable contract.

U. S. vs. Gibbons, 109 U. S., 200.

It would seem by analogy to clauses in construction contracts, such as that in the Robinson contract, permitting owners to annul the contract and take charge of operations if proper speed be not made, that the fixing of the new date in any event must be at the time of the owner's delay and not after completion of the contract—must, in fact, create a new contract, expressed or implied.

The power to establish a forfeiture must be exercised within the time mentioned in the contract, and before the time for the completion of the contract has expired.

Henderson Bridge Co. vs. O'Connor 88 Ky., 303.

Walker vs. London & N. W. R. Co., L. R. I. C. P. Div., 518.

While the authorities are fewer in construing liquidated damage contracts with a contract clause in case of mutual delays authorizing some one to certify to delay or for arbitration of same, counsel know of none that, if such were a correct interpretation of the instant contract, would sustain the Supervising Architect had he ascertained the suspen-

sion delays, much less a court's undertaking so to do and there are a few to the contrary.

Caldwell & Drake vs. Schmulbach 175 Fed., 429.

The contract, as to liquidated damages, provided (p. 432):

> "The contractor agrees and binds himself to have all the work contemplated by these articles finished and ready to turn over to the owner by December 31, 1905, and in case of a failure in this particular, agrees to pay to the owner the sum of $50 per day as measured damages for each and every day beyond the said 31st day of December, 1905, that the said failure exists, provided, however, that said contractor shall have credit for such days as the architects and owner shall certify at the time as the days when the weather forbids work; *and credit for each and every day he is delayed by the owner or other contractors employed by the owner, if such delay is also certified to by the architects and owner at the time it occurs.*" (Italics ours.)

The record shows the court, following Sun Printing Assn. vs. Moore and other cases, recognized fully the doctrine of liquidated damages as applicable. It then held:

> "The principles here established have no application to cases where, under such contracts for liquidated damages for delays, such delays have arisen from (a) the fault of the owner; or (b) that of his agents and independent contractors; or (c) by the joint and mutual default of owner and contractor.

Such cases must be governed, I conceive, by the rulings in such cases as Jefferson Hotel Co. vs. Brumbaugh 168 Fed., 867; Vilter Mfg. Co. vs. Tygart's Valley Brewing Co., 168 Fed., 1002; Stewart vs. Ketaltas, 36 N. Y., 388; Heckman vs. Pinkney, 81 N. Y., 211; Weeks vs. Little, 89 N. Y., 566; Lilly vs. Person, 168 Pa., 219; Focht vs. Rosenbaum, 176 Pa., 14; Wilkens vs. Wilkerson (Tex. Civ. App.) 41 S. W., 178. In the Jefferson Hotel case, *supra*, the Circuit Court of Appeals for this circuit fully considered this very question, and determined that the courts would not undertake to "apportion" the damages occasioned by mutual delays and I think very clearly set forth some of the pertinent reasons why it would not do so. In this case there can be no question that the delays were the result of mutual default. It is not denied that the ground upon which this building was to be and was erected was hemmed in by other buildings; that in the very start wholly unexpected and extraordinary measures, not contemplated by the contract, had to be taken to protect these adjoining buildings from damage and destruction; that the architects by some strange error by their plans and specifications provided for a larger building than the lot of ground would contain; that a number of additional contracts were let to contractors wholly independent of plaintiffs, who delayed the work; that a very great number of changes were made, so many, in fact, that the original specifications could hardly describe the final result. Under such circumstances, I am clearly of the opinion that this case, like the Jefferson Hotel one, presents a very striking example of how im-

possible it would be for a court to attempt to determine and apportion the cause of delay between the owner and contractor, both of whom are in default. *But it is insisted that the contract itself here provides in express terms for such apportionment of delay, and in this particular differs from the terms of the one in the Jefferson Hotel case. It seems to me that this cannot change the situation.* The law is that courts by reason of the very uncertainty, the impossibility to fairly and justly determine the causes of such mutual delays and their effects will not attempt to apportion."

Early vs. Tussing 182 Mich, 314, was a case of a building contract with a provision for arbitration and for liquidated damages. The arbitrators undertook to apportion the liquidated damages, charging 150 days or two-thirds of the delay to the complainants, the contractors, and one-third to the owners. A question arose as to whether the contract provided for arbitration of this item, but the court held that the contract did include liquidated damages within the submission to arbitrators (p. 324). It overturned the arbitration, however, on the ground that as to liquidated damages the award "was a gross and palpable mistake of law."

It held in substance, citing 3 Halsbury's Laws of England, 243-5 and the English and some American cases, that "there must be a definite date from which liquidated damages are to run" and that "for delay in consequence of some delay caused by the employer" there must be a power when the delay occurs to extend the time and this power must be ex-

ercised at the time and a new date named and not left to be claimed at the accounting and settlement.

Second Claim. The Court Erred in Holding Appellant Liable for Replacing Defects Due to Faulty Specifications Complied With Under Protest.

This claim asks recovery of items of $1,043.69 and $10,401.45 embraced in Findings XXI and XXII. The Court of Claims ruled against appellant on the ground that he had guaranteed the work for one year. The facts are fully set forth in the Statement of the Case.

The legal proposition advanced by the learned court below and on which the case turns is that a contractor giving a year's guarantee must make the work constructed good for one year regardless of whether he performed his contract in the best possible manner and regardless of the fact that the defects developed were due to faulty and improper specifications complied with by the contractor only after protest and prediction that strict compliance would result in the very defects which later developed. It seems to counsel that the matter after all is but a phase of the general legal principle that a party cannot recover for his own negligence. Is the legal principle any different, taking the guarantee at its most disadvantageous angle to appellant? The contract was an entire, indivisible one. Can it be said appellant followed orders lawfully given him by appellee at his, the appellant's, own risk? Had he a right to refuse compliance with the orders? Must he refuse and risk annulment of his whole contract? Or, if he complied, take on him-

self the consequences of appellee's error? Can the appellee profit by its own wrong? What right had appellant to assume the final say? If the rule of reason is to govern judicial decisions then the guarantee and appurtenant provisions of the contract must be construed not to relate to work performed properly under protest against unwise requirements, but as a guarantee protective of appellee against appellant or his work and materials for the period of one year and not as protective of appellee against its own shortcomings. This legal proposition determined in appellant's favor the conclusion from the Court's finding must be in favor of appellant.

It was to be expected the architect and supervising architect would seek to throw the blame for their errors on appellant as far as they could do so. But the utmost the Court of Claims attempts is to state that the materials of some of the sash and some workmanship were not first class. The vast bulk of this construction it is apparent did meet specifications and it is obvious the difficulty was with the Government requirements. How much the predicted warping affected adjacent material and made possible a claim, after the event, it was not good or well installed in the first place is manifestly impossible. The architect had full control over the contractor and power of rejection of materials and workmanship. How fully he exercised it is apparent from the marble findings (No. XI) where though the contract required him to select the marble or change same while "in the yards of the contractor or in the market" (p. 36) he undertook to reject marble slabs to meet his ideas from time to time as to the

color scheme after the marble slabs had been in place in the walls for months with other marble superimposed upon it. All sash, frames and work were under his inspection by the terms of the contract.

It is submitted the burden of proof was on the Government of showing the quantity and value if any of materials replaced within a year to take the place of any sash or frames proving defective in material or workmanship and that it failed to sustain the burden.

The applicable rule is thus stated in Thomas Trustee vs. U. S., 53 Ct. Claims, 430:

> "Where the United States charges against certain retained percentages due the contractor a number of items of expense alleged to have been incurred in completion of the work, they must assume the burden of furnishing such proof as will justify the conclusion that the charges were proper charges."

While there are, counsel believe, other errors of law as they involve neither matters of general principle nor considerable amounts, they are passed over in the interest of the Court's time.

Respectfully submitted,

CHAS. H. MERILLAT,
CHAS. J. KAPPLER,
Attorneys for Appellant.